

Zimbabwe Law Review



Volume 15

1998

THE ZIMBABWE LAW REVIEW

1998 VOLUME 15

CONTENTS

ARTICLES

- Retrenchment and the Law 1
LOVEMORE MADHUKU
- Criminal Justice and the Truth in Zimbabwe: A Necessary Introspection? 18
CHARLES GOREDEMA
- Women, Land and the Constitution 42
J. E. STEWART
- Judges in the Storm: The Judicial Review Debate 50
MUNYARADZI GWISAI
- Electoral Law in Zimbabwe 64
LOVEMORE MADHUKU
- The Judiciary and Democratic Governance in Sub-saharan Africa:
The Complexities of Regulating Competing Interests 91
SUFIAN HEMED BUKURURA
- An Appraisal of the Recommendations of the Law Development
Commission on Misrepresentation in Insurance Law 103
MICHELE MENEZES
- Amendment of an Indictment: When is it Proper Under Botswana Law? 114
KABELO KENNETH LEBOTSE
- Towards a Compensatory Approach to Redressing Constitutional
Violations in Botswana 120
DUMA GIDEON BOKO

NOTES AND COMMENTS

- Class War in The Courts? Retrenchment Packages and *Continental
Fashions (Pvt) Ltd. v. Mupfuri and Others* 134
MUNYARADZI GWISAI
- Municipal Law: The Law Regulating Conditions of Service for
Junior Local Government Employees 144
ARTHUR MANASE

CLASS WAR IN THE COURTS? RETRENCHMENT PACKAGES AND *CONTINENTAL FASHIONS (PVT) LTD. V. MUPFURIRI AND OTHERS**

Munyaradzi Gwisai

Lecturer, Public Law Department, University of Zimbabwe

INTRODUCTION

In the last decade capitalism has witnessed a major continuous crisis locally and internationally. Such crisis has led to a major re-organisation of capitalism with an emphasis on free market policies with accelerated attacks on the working class.¹

In the field of labour law, such attacks have seen the tightening up of an already strongly anti-working class legislative framework,² as thousands of workers have lost jobs through retrenchments.

This attack has not been confined to capital alone but includes the judiciary. In the last few years, the courts have been waging a silent but vicious war against the working class. Law and its enforcement agents like courts are not neutral social phenomena, but are conditioned by the economic base of society.

In spite of their protestations to the contrary, the courts ultimately exist to advance and protect the domination of capital over labour. Through the ideology of rule of law they foster a false illusion of being impartial social organs of dispute resolution.³

That the contrary is the reality is amply demonstrated by the recent Supreme Court case of *Continental Fashions (Pvt) Ltd. v. Mupfuriri and Others*⁴ dealing with the issue of severance packages on retrenchment.

FACTS OF THE CASE

Matters pertaining to retrenchment are governed by the Labour Relations (Retrenchment) Regulations, 1990.⁵ Initially, parties must seek to reach agreement on the retrenchment and/or the quantum of severance pay at the relevant authority. Where this is not possible, the matter is referred to the Retrenchment Committee, which makes recommendations to the Minister of Labour. If a party is still aggrieved, they may appeal to the Labour Relations Tribunal.

* 1997(2) ZLR 405(S).

1. Sibanda A., "IMF-World Bank Impact on Zimbabwe", B. Onimode (Ed), *The IMF, the World Bank and the African Debt* (Zed, London 1989).
2. For instance the Labour Relations (Amendment) Act, 1992 which undermined employment security by removing the duty on the employer to have state approval before terminating employment, in situations where there are registered codes of conduct.
3. Kiselyov I., *State Monopoly Capitalism and Labour Law* (Progress Publishers, Moscow, 1988).
4. SC 161/97.
5. Statutory Instrument 404 of 1990.

In the instant case in which the employer alleged financial difficulties, there was failure of agreement at the National Employment Council on the severance package. The matter was referred to the Retrenchment Committee and the Minister accepted its recommendations. Both the employer and employees were dissatisfied with the Minister's decision. There was an appeal and cross appeal to the Labour Relations Tribunal. The differing positions were as follows.

A. Original Positions at the NEC

Package Offered by Employer:

- Two days pay for every year served;
- One suit for every retrenchee.

Employees' Position

- Five weeks pay for every year served;
- Relocation allowance of \$3 000;
- Notice as per statutory requirement;
- Medical Aid for five months;
- Three suits per retrenchee;
- Re-employment preference for retrenchees;
- Statutory terminal benefits.

B. Minister's Determination

- Three months severance pay;
- One week's pay for every year served;
- One suit for every retrenched worker;
- Gratuity/pension;
- Effective date, June 30, 1996.

C. Employer's Re-Adjusted Position on Appeal

- Three months severance pay to be reduced to one month;
- One week's pay for every year served to be reduced to three days pay for every year served;
- The rest of the Minister's determination accepted.

The Labour Relations Tribunal rejected the employer's pleas of an alleged precarious financial situation, holding that in the determination of whether severance pay should be paid and the quantum thereof, the ability of the company to pay was not the fundamental consideration.⁶

6. *Continental Fashions (Pvt) Ltd v. Mupfuri and Others* LRT/H/53/96 at p 9.

The employer appealed to the Supreme Court, which held that the Labour Relations Tribunal's position was a fundamental misdirection. It accordingly set aside the Tribunal's order and confirmed the Minister's order but subject to a reduction of the figure of three months severance pay to one month's severance pay.

SEVERANCE PAY: RIGHT OR PRIVILEGE?

The first issue to look at in assessing the issue of retrenchment packages is one of whether there is a right to a retrenchment package.

The Labour Relations Act,⁷ itself does not deal with the matter directly.⁸ The matter is dealt with under the Labour Relations (Retrenchment) Regulations, 1990. Section 3 (2) of such Regulations provides as follows:

- 3(2a) Without any derogation from the generality of subsection (2), an authority shall attempt to secure agreement on the following matters -
- (a) the possibility of implementing measures to avoid the retrenchment of employees, including -
 - (i) . . .
 - (b) if the retrenchment of employees is unavoidable -
 - (i) the phasing of retrenchments over a period of time; and
 - (ii) the criteria for selecting employees to be retrenched; and
 - (iii) the benefits to be paid on retrenchment, including redundancy or severance payments and relocation allowances.

The regulations therefore do not create a clear direct right to severance pay but only place a duty on the parties to "attempt to secure agreement" on the matter.

The issue of whether there exists a right to severance pay has raised controversy in bourgeois labour law. On the one hand has been the right-wing ideological camp which has rejected outright the existence of such a right. Opposed to it is the liberal ideological camp which recognises a limited right to severance pay.

Right-wing Ideologies

In interpreting statutes, right-wing ideologues take a strict literalist position whereby statutes are narrowly construed with words given their ordinary grammatical meaning unless this operates against the interests of capital.⁹ D. du Toit¹⁰ calls this the "literalist-

7. Chapter 28:01.

8. As pointed out by McNally JA there are only "two passing references to retrenchment" in the Act, namely section 5 (1) (e) and section 17(3)(s), which is the enabling provision for the Regulations.

9. An example of this has been that of the whittling down of the jurisdiction of the Labour Relations Tribunal ostensibly on the basis that its powers are as literally defined in the statutes. *Air Zimbabwe Corporation v Mlambo* 1997 (1) ZLR 220 (S) (McNally JA); *Minerals Marketing Corporation of Zimbabwe v Mazvimavi* 1995 (2) ZLR 353 (Gubbay CJ). Indeed the instant case itself is an example of such attack on the authority of the specialised labour courts by the formal courts. The Labour Relations Act s92 (2) makes the Labour Relations Tribunal the final appellate court on matters of fact. Thus in this case the Tribunal's determination of whether or not the company should pay a particular level of retrenchment package, i.e. a question of fact, should have laid the matter to rest. But the court has virtually destroyed this, by a very broad interpretation of what amounts to questions of law, to include fact situations thus giving themselves their original jurisdiction. Also see Madhuku L., "Jurisdiction of the High Court in Labour Disputes — A Note on Recent Cases", (1995) 12 *Zim. L Rev* 152.

10. D. du Toit *et al.*, *The Labour Relations Act of 1995* (Butterworths, Durban, 1996) p 43.

cum-intentionalist" model of interpretation. Such model is extremely hostile to interpreting statutes in their social-political context as this raises fundamental questions about the nature and purpose of law.

It is this model that has enjoyed ascendance in the last two decades consistent with the rise of neo-classical schools of thought. It is this right-wing ideological model that is the major inarticulate premise underlying McNally JA's decision in *Continental Fashions v. Mupfuri and others*.

The honourable judge starts off by arguing that "the legislation in respect of retrenchment is not very helpful to those required to apply it". This sets the scene for the court to invoke its own anti-working class notions and prejudices into the Regulations minimising the extent of labour's entitlement to severance pay. As will be shown later this is completely at variance with the objectives underlying the Regulations.

Indeed in its overzealous objective to promote the interests of capital, the court assumes positions that fly even in the face of the literalist tradition. At page 3 the learned judge opines:

'Retrenchment', when used in the context of labour relations, means a cutting back of expenditure on the employment of workers by reducing their number (The definition is mine. There is none in the Regulations).

There is of course a very elaborate definition of the term "retrenchment" in the Regulations, which the court chose to ignore. Section 2 of the said Regulations defines the term "retrench" as to mean:

to terminate the employee's employment for the purpose of reducing expenditure or costs, adapting to technological change, closing down or re-organising the undertaking in which the employee is or was employed, or for similar reasons.

However, the court's action is not accidental. It is the basis on which the court's judgement rests. The court substituted its own narrow definition of retrenchment in order to justify its creation of a hierarchy of categories or types of retrenchment with differing consequences, which is not there in the Regulations.

The court held that in situations where retrenchment arose out of the desire to avoid collapse and liquidation of the company, the situation was different from other situations of retrenchment, for instance those resulting from mechanisation or mere restructuring. In the former case "the well-being of the retrenchees cannot be the only consideration. The survival of the company is the motivating consideration . . ."¹¹

From such position, the court then catapulted into holding that in such retrenchments the survival of the company becomes the chief concern, and therefore its "ability to pay the retrenchment package is the ultimate criterion — the bottom line". This therefore marks a departure from section 7 of the Regulations which explicitly states the need to mitigate the consequences of retrenchment as far as possible. This was different from the position of the Labour Relations Tribunal, which, while recognising the financial position of the company to pay as an important factor in assessing the severance package, did not make it the fundamental consideration.

11. At p 3.

Taken to its logical conclusion, McNally's position means that a company which shows that it has "virtually zero cash flow" can be completely excused from paying any retrenchment package. After all, its survival is "the bottom line." In other words it means labour's claim to severance pay rests on very precarious grounds under the McNally schema. Indeed this explains the anti-labour outcome of the instant case.

McNally JA's position is very similar to that adopted by courts of a similar ideological ilk in South Africa before the enactment of the Labour Relations Act, 1995. Using such approach such courts rejected the notion of a right to severance pay, that had been upheld in earlier decisions.¹² The right to severance pay was rejected in decisions such as *Young & another v. Lifegro Assurance Ltd.*¹³ The basis of these cases was to dismiss the assumption underlying a right to severance pay, namely that workers acquired proprietary rights in a job. It was argued there was no legal basis for such entitlement as workers were duly compensated through wages. A claim for severance pay was characterised as one of substantive economic interests which is more properly the subject of collective bargaining as opposed to a legal right.¹⁴

LIBERAL BOURGEOIS IDEOLOGY

However, the above ideological positions only reflect a particular version of bourgeois ideology and have been attacked by liberal bourgeois scholarship. Contrary to the "literalist-cum-intentionalist" model of interpretation, the "purpose-seeking" model used by bourgeois reformist ideologues seeks to "embrace a more contextually-sensitive and value-coherent approach to statutory interpretation".¹⁵

The underlying rationale behind this being that in order to get the true intention of the legislature, the interpreter must go beyond the manifested literal intention manifest in the words. To do this, the interpreter should "make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources".¹⁶

Such a model reflects the value positions of liberal bourgeois ideologies which seek to ameliorate the inherent conflict between labour and capital through concessions to the former.¹⁷ Such a model of interpretation allows the maximisation of the reformist utility of

12. Such as *Ntuli and Others v. Hazelmore Group t/a Musgrove Nursing Home* (1988) 9 ILJ 709 (IC); *Cele and Others v. Bester Homes* (1990) 11 ILJ 516 (IC).

13. (1991) 12 ILJ 1256 (LAC). Other cases that confirmed this right-wing approach were *Bester Homes (Pty) Ltd v Cele and Others* (1992) 13 ILJ 877 (LAC); *Hooenoeg Andolusite (Pty) Ltd v NUM and Others* (1) (1992) 13 ILJ 87 (LAC).

14. These arguments drew heavily on positions advanced by Cameron, Cheadle and Thompson, *The New Labour Relations Act* (Juta, 1989) 128, wherein the authors severely criticised the *Ntuli* decision for its characterisation of a severance claim as a legal one, when in fact it was an economic-related one. See generally P. A. K. le Roux and A. van Nierkerk., *The South African Law of Unfair Dismissal* (Juta & Co Ltd 1994) pp 265-271; D du Toit (et al) *The Labour Relations Act of 1995* (Butterworths, Durban, 1996) p 374; and Grogan J., *Workplace Law* 2nd ed. (Juta & Co, 1997) pp 153-155.

15. D. du Toit., *op. cit* at p 44.

16. G E Devenish *Interpretation of Statutes* (1992) p 36.

17. Rycroft A., and Jordaan B., *A Guide to South African Labour Law* 2ed (Juta & Co, 1992), pp 115-129.

paternalistic welfarist labour legislation like the Labour Relations (Retrenchment) Regulations, 1990.¹⁸

Using such a model of interpretation, bourgeois reformist courts have been able to recognise a limited right to severance pay. In South Africa, before *Young & another v. Lifegro Assurance Ltd*,¹⁹ the courts fashioned a substantial right to severance pay jurisprudence, following developments in England. The courts grounded that right on two main grounds.

Firstly on the "unfair labour practice" concept in the 1956 Labour Relations Act.²⁰ Failure to pay severance pay was held to be an unfair labour practice in so far as it adversely affected the relationship of the employer and employee and unfairly prejudiced and jeopardised the worker's employment opportunities and work security.

Secondly, a more powerful ground was the one that moulded the claim in a proprietary sense. This route had already been chartered by Lord Denning in *Lloyd v. Brassey* where he held: "A worker of long standing is now recognised as having an accrued right in his job..."²¹

Once so characterised, severance pay becomes one of right because if the worker had earned a proprietary right to her job, then she must be compensated for the loss of the same, due to no fault of hers.²²

This is a powerful ground of equal application here. In South Africa, such an interpretation received legislative confirmation in the form of section 196 of the Labour Relations Act, 1995 which provides that employers must pay "severance pay equal to at least one week's remuneration for each completed year of service with that employer". The situation in England has also been similar with a worker's right to redundancy pay guaranteed under section 135 of the Employment Rights Act, 1996.

Taking the above, it is submitted that a proper interpretation of the Regulations is one which places as paramount and fundamental, the employee's entitlement to severance pay rather than one which places emphasis on the position of the employer as was done in *Continental Fashions v. Mupfuriri* by McNally JA. Put in other words it is submitted that the interpretation by the Labour Relations Tribunal was the correct one.

18. See for instance *Chiworese v Rixi Taxi Services Co-op Society* HH 13-93 where Smith J held that a taxi driver, whose contract categorised him as an independent contractor, was nonetheless an employee under the Labour Relations Act, Chapter 28:01 because to rule otherwise would go against the real intention of the Act to protect workers from arbitrary dismissal. See also *Nyambirai v National Social Security Authority and Another* 1996 (1) SA 636 (ZS) where the purpose-seeking model was used.

19. (1991) 12 ILJ 1256 (LAC).

20. s1 of the Labour Relations Act defined "unfair labour practice" as meaning, *inter alia*: "an act or omission, other than a strike or lockout, which has or may have the effect that:-

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby".

21. (1969) 1 A II ER 382 at 383E.

22. See generally *P A K le Roux*, *op. cit.* At p 265.

UNDERLYING LEGISLATIVE OBJECTIVES

McNally JA's judgement fails to make due cognisance of the underlying objectives of the Regulations and the principal legislation. Taken in its whole context, it is clear that the intention behind the Retrenchment Regulations is to "prevent unnecessary and wholesale retrenchments of employees by employers" and where it is deemed unavoidable to minimise the consequences through retrenchment packages.²³ Such interpretation is also consistent with one of the judicially-acknowledged major underlying premises of the principal act, namely to protect and advance the interests of workers.²⁴

Further, section 7 of the Regulations specifically refers to the need to avoid retrenchment of employees as far as possible and to mitigate the consequences where retrenchment is deemed unavoidable. Sections 9 and 10 reinforce this by making it a criminal offence to unlawfully retrench workers and making any such retrenchment null and void.

The amendments to the Regulations further fortify the interpretation that payment of severance pay is mandatory under the Regulations.²⁵ There can be no greater deterrence to employers from just resorting to retrenchment at the first whiff of economic problems than by making a severance claim both mandatory and expensive for the employer.²⁶

McNally's distinction of types of retrenchments through which he seeks to escape from this obvious legislative objective is redundant. In the first place no such hierarchy of categories of types of retrenchment is found directly in the regulations. The learned judge himself admits as much.²⁷

Further evidence that it was not the intention of the legislature to create such distinction is found in the amendment to section 2 of the regulations by the Labour Relations (Retrenchment) (Amendment) Regulations, 1992 (No. 1).²⁸ If the legislature meant to make the survival of the company the bottom line, then it would not have added the category of "closing down".

The distinction that is also made between workers targeted for retrenchment and those remaining, with the latter impliedly having the same interest as the employer in minimising retrenchment packages in order to save the company and their jobs is not convincing. The experience has been that once employers engage on an exercise of retrenchment, they are likely to come for the second if not third round, as the current economic crisis bites and

23. per Muchechetere JA, *Chidziva and Others v Zimbabwe Iron & Steel Co. Ltd.* 1997(2) ZLR 368(S). See also *Prosser and Others v Zimbabwe Iron and Steel Company Ltd* HH-201-93, HH-673-93 at 3.

24. *Art Corporation Ltd. v. Moyana* 1989 (1) ZLR 304 (SC); *Chitworese v. Rixi Taxi Services Co-op Society* HH 13-93.

25. This is clearly the purpose behind the Labour Relations (Retrenchment) (Amendment) Regulations, 1992 (No. 1) which create an additional category of type of retrenchment, namely "closing down", make it mandatory for the parties to attempt to secure agreement "on the benefits to be paid on retrenchment, including redundancy or severance payments and relocation allowances", and in section 8B stipulate special measures that employers and workers may agree to in order to avoid retrenchment.

26. Grogan J., *op. cit.* At p 154.

27. On page 3 paragraph 3 where he states "Clearly therefore, although it is not stated in the Regulations, the ability of the company to pay the retrenchment package is the ultimate criterion — the bottom line."

28. Statutory Instrument 252 of 1992.

bosses look for the soft targets. It is therefore in the interest of both groups of workers to fight hard to resist retrenchment in the first place. Where this is not possible, then to fight for the highest possible retrenchment package. This kills two birds with one stone. In the first place it ensures that those who are leaving go with a decent package. In the second place, the higher the package the lesser the temptation on the employer to go on a second round of retrenchment, as it is unlikely that workers targeted then would go on packages lesser than those in the first round. So jobs are protected in the long term, or at least it allows workers to fight for progressively higher levels of retrenchment packages.

Thus it makes sense for both groups of workers to unite. This means in practice, just as in theory, McNally's distinction fails to meet the grade.

It is also strongly arguable that the line of cases in South Africa like *Lifegro Assurance Ltd* which seem to have strongly influenced the learned judge²⁹ are distinguishable from the situation in Zimbabwe. In the first place, whereas in South Africa then there was no elaborate statutory definition and treatment of the area of retrenchment law other than the definition of "unfair labour practice" in the Labour Relations Act, 1956, in Zimbabwe such elaborate statutory provisions exist in the form of the Regulations. And as has been shown above, such regulations have strong indications on the need to have severance pay made. And in any case, the South African Labour Relations Act, 1995 now provides for statutory severance pay as indicated above.

Taken to its logical conclusion McNally JA's "ability to pay" criterion makes payment of severance pay discretionary in the sense that a company which purportedly shows an "inability" to pay can escape from paying anything. This, it is submitted, in view of the above is contrary to the purpose of the legislature as shown above.

It is submitted that the free room of manoeuvre or bargaining available to the parties is one on the quantum to be paid and not on the principle of whether any payment should be made. To use the "ability to pay" criterion as the ultimate criterion on this basis fails to recognise that in paying a retrenchment package, a company is making an investment in its future just like any other investment. If the company's chances of survival are so bleak as to justify paying nothing to the workers then it might as well file for liquidation as it is no longer viable. In either case the job security of labour is not guaranteed.

Indeed the dangers of McNally JA's criterion can be shown in that employers can misrepresent their actual financial position in order to justify not paying, more so in situations where employers are not required to make 100 per cent information disclosure of their financial situation.³⁰ The Tribunal had held that the company had failed to make due financial disclosure as required by law.³¹

29. The latest material the court refers to (on p 4) is a 1993 text, namely Riekert's *Basic Employment Law*, 2nd Ed) but since then not only has such textbook been up-dated, see Grogan J., *Workplace Law* 1997, *op. cit*; but the position in South African law itself changed, reversing the then position stated in Riekert's. See footnote 14 above for references.

30. As admitted by the judge himself at page 4 and also in *Atlantis Diesel Engineers (Pty) Ltd v National Union of Metalworkers* 1995 (3) SA 22 (AD).

31. At p 15 LRT/H/53/96.

DIFFERENCES NOT FUNDAMENTAL

Whilst significant differences exist between liberal reformist bourgeois legal ideology and the neo-classical right-wing one, such differences are not fundamental. Whilst the former is prepared to buy industrial peace by making some concessions to labour in the form of recognition of a claim to severance pay, which the latter rejects, in the end the nature of the quantum of claim recognised as legitimate by liberal ideology exposes its class bias. As pointed out both in South Africa and England, the quantum statutorily recognised is around one week's pay for every year worked. This is the same quantum endorsed by McNally in the instant case. This is peanuts.

This is not surprising in view of the fact that both ideological tendencies ultimately accept the legitimacy of bourgeois private property, which is precisely based on the unpaid for surplus value created by labour. The demand for a severance pay is a reformist one, which simply demands that in the computation of the value of labour power, account be taken of the period when the owners of such labour power are rendered unnecessary by the vagaries of the market, and that they be paid something whilst they wait to be re-engaged again when the economic pace picks up again. It is therefore very similar to an unemployment benefit. It is capitalism which in fact ultimately benefits from such a scheme, as it ensures that the reserve pool of the unemployed remains fit and ready to resume duty whenever called upon to do so.

Currently right-wing elements on the Zimbabwe bench have been able to gain the upper hand partly because of the open-ended nature of the Retrenchment Regulations. Because the Regulations do not expressly create a right to severance pay in similar manner to the South African and English legislation, such elements have had a field day. It is incumbent that the regulations be amended to expressly create a right to severance pay and the amount thereof.

Unfortunately the same situation has been repeated in the Labour Relations Bill, 1997. Section 20 as read with the Second Schedule of the same dealing with retrenchment replicates the regulations, but even drops the express obligation currently placed on the parties under section 3 (2b) to attempt to secure agreement on retrenchment benefits including redundancy or severance pay. This will only fortify the right-wing bourgeois legal ideology represented in *Continental Fashions (PVT) Ltd. v. Mupfuri and Others* and characteristic of the current Zimbabwe Supreme Court.³²

Ultimately, labour's claim to retrenchment pay lies in the very nature of the exploitative relationship between capital and labour under capitalism. At a general level, it is morally wrong to make workers pay, through loss of jobs and non-payment of retrenchment packages. The economic crisis which leads to economic difficulties and restructuring by employers, resulting in retrenchments, is a direct result of the employers' economic system of capitalism. Capitalism is a system based on unregulated competition between property owners in the drive for increased profits. Inevitably, this leads to economic anarchy and

32. Similar right-wing ideological influence was at play in *Chidziva and Others v. Zimbabwe Iron and Steel Co. Ltd.* in which the majority decision of the court in open defiance of the specific wording of sections 9 and 10 of the Regulations, refused to nullify a retrenchment exercise that was openly in violation of the Regulations, on spurious common law grounds of waiver.

crises of booms and slumps.³³ The very bosses who benefit from this system must be the ones to pay for the inevitable crises of such system and not its victims, the workers.

At a more specific level, as K. Marx amply demonstrated, wages only represent at most the average value of labour power and not the value of the product of labour.³⁴ The surplus value produced by the worker's labour is expropriated gratuitously by the capitalist and forms the basis of his profits and accumulates over time. This puts the lie to the right-wing denials of an accrued proprietary right to a job, since in many ways a severance pay represents a tiny claw-back on the unpaid for surplus value created by the worker over the years.

But to give labour a general right to work and fair remuneration for work done would be to eradicate capitalism itself. Thus, within the parameters of capitalism, labour's struggle can only be one of recognition of a limited right to severance pay. This is not to say that such struggle is not important. It is. But the important point to note is that the recognition of such right and the level of the retrenchment package ultimately will not be determined in the hallowed corridors of the courts but with the balance of class struggle in the particular industry or society, of which the militancy and organisation of the proletariat is central.

In South Africa, militant class action led to the codification of such right under the Labour Relations Act, 1995, reversing decades of bourgeois judicial precedents. In recent months in Zimbabwe workers who have been prepared to resort to militant class struggle such as those at the Reserve Bank of Zimbabwe and University of Zimbabwe have been able to score significantly much better packages than the "norm" recognised by the bourgeois courts.³⁵

33. Marx K. and Engels F., *Communist Manifesto* (Progress Publishers, Moscow 1969).

34. Marx K., *Wage, Labour and Capital* (Bookmarks, London, 1996) p 23.

35. For instance, University of Zimbabwe workers who embarked on a militant demonstration got a retrenchment package in July 1998 of:

1. severance pay three months salary;
2. notice pay three months;
3. gratuity, one and half months' salary for each year completed from 1994;
4. one month's allowance for each year completed from 1994;
5. relocation allowance of four thousand dollars;
6. pension as per rules and regulations.



This work is licensed under a
Creative Commons
Attribution – NonCommercial - NoDerivs 3.0 License.

To view a copy of the license please see:
<http://creativecommons.org/licenses/by-nc-nd/3.0/>

This is a download from the BLDS Digital Library on OpenDocs
<http://opendocs.ids.ac.uk/opendocs/>